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30860—25——1

In the Supreme Court of the United States

OCTOBER TERM, 1924

NAMPA & MERIDIAN IRRIGATION DISTRICT, appellant *v.* J. B. BOND, PROJECT MANAGER OF BOISE Project of the United States Reclamation Service, and Payette-Boise Water Users' Association, Ltd.	No. 135

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE, J. B. BOND

STATEMENT

The Nampa & Meridian Irrigation District, plaintiff and appellant herein, will be designated in this brief as "the District."

The District brought this suit against the Project Manager of the Boise Project of the United States Reclamation Service. Its purpose was to obtain a decree enjoining him from withholding water from the District lands as a means of compelling the District to pay its proportion of the spe-

cial operation and maintenance charges fixed by the Secretary in his public notice of February 15, 1921 (R. 19, 20). The Payette-Boise Water Users' Association, representing the project lands outside the District, intervened and resisted the bill of complaint, to the end that those lands might not be compelled to bear the whole burden of future drainage work.

In the beginning, as stated by the District Court, all the project lands, whether within or without the District, had precisely the same status (R. 33). They were all bound by subscriptions to the stock of the Payette-Boise Water Users Association, and thereby subjected to a lien for the charges to be imposed by the Secretary of the Interior. The record does not show when the District was organized as a separate legal entity under the State laws. It does show, however, that the Water Users Association had made a contract with the District as early as October 12, 1906 (R. 12, par. 15).

Evidently there was no material change in the status of the project lands within the District until the contract of June 1, 1915, here in question. By that contract the project lands within the District were released from their stock subscriptions contracts with the Water Users Association (R. 12, pars. 15 and 16); the District took the place of the Water Users Association as the representative of those lands in their relations with the government, and became responsible, primarily, for the payment

of both construction and operation and maintenance charges (R. 10, par. 12).

One of the main inducements to the making of this contract was that large areas of the District lands were becoming seeped and water-logged, and required prompt drainage. These were the first lands in the project to need drainage, and the construction of a drainage system for them was the first matter dealt with in the contract. The government agreed to construct a drainage system for the District at the primary expense, of course, of the Reclamation Fund. As was just and equitable, the old water right lands were to bear the whole expense of that part of the drainage works serving them alone. But that part serving the project lands within the District was to be charged " to the general expense of the Boise Project " (R. 7 and 8, par. 3).

By the supplemental contract of November 5, 1918, the cost of this drainage system (then nearing completion) was fixed at $340,000; the amount chargeable to the District exclusively, for the old water right lands, was determined to be $162,-369.84; and the remainder, $177,630.16 (later apparently diminished by further adjustment of credits to $158,139.56, R. 47), was charged to the government as part of the costs of the project and was finally included in the construction costs announced by the Secretary in his Public Notice of July 2, 1917. (16th Ann. Report Reclamation Serv-

ice, 126.) As the project lands outside the District comprise 100,000 acres and the project lands within the District 40,000 acres, it is apparent that the lands outside the District are now irrevocably charged with the expense of draining the District project lands in the proportion of 2½ to 1.

After the Public Notice fixing the construction charges, the Payette-Boise Water Users Association brought suit against the Project Manager to test the correctness of various items forming the basis of the construction charge fixed by the Secretary, but there was apparently no complaint as to the item now under consideration. After the rendition of an opinion by the District Court on the questions involved (269 Fed. 159), the suit was settled by a comprehensive agreement between the United States and the Water Users Association, dated July 12, 1921, which, by stipulation, was embodied in the final decree in that case (R. 19). By paragraph 10 of that agreement (R. 22) the Water Users Association (then representing only the project lands outside the District) stipulated that:

> All future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes, etc.

At the time, therefore, when the special operation and maintenance charge for drainage pur-

poses now complained of was made, the situation was that the lands outside the District were pledged (by this agreement) to pay a charge so fixed and denominated, and the District was pledged by the agreement of June 1, 1915 (par. 12), to pay "the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project," etc. It is a reasonable inference that the Secretary, in announcing the special charge, understood that both classes of lands were bound by these agreements to pay it.

However, the notice as issued does not purport to rest upon the agreements and contains no reference to them, and must therefore be considered as made under an authority and discretion which he believed was vested in him by law. The questions involved are, therefore, first, whether he had such authority under the law; and, second, whether, in any event, the District was bound by its agreement to accept and pay such a charge.

The courts below both decided that he had authority and discretion under the law to impose the special charge, and neither seriously discussed the District's agreement, although the Circuit Court of Appeals said that there was force in the government's contention regarding it.

We insist here on both propositions, and if either is sustained the decree below must be affirmed.

ARGUMENT

I

The position of the appellant is wholly inequitable

The necessity for drainage first arose within the District, and the government has constructed for it a drainage system. The cost of that part of the system draining project lands was assessed ratably to all the project lands as part of the costs of construction; and the lands outside the District, because of their greater area (100,000 to 40,000 acres), must pay for it in the proportion of 2½ to 1.

Now, when the lands outside need drainage, the District seeks on purely technical grounds to escape its ratable share of the burden. The court will not, of course, sustain a claim so grossly inequitable unless the technical grounds relied upon absolutely require it.

A further circumstance indicating the inequity of appellant's position is the fact that the original contract between the Secretary and the Irrigation District was prepared (and doubtless agreed upon in substance) before the passage of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686), upon which the District now places its main reliance.

In its heading the agreement is styled "Draft of July 24, 1914," which was over three weeks before the passage of the Extension Act. In its first line, however, it purports to have been made June 1, 1915, and in the bill of complaint it is pleaded as

an agreement of that date. We assume, therefore, that it became effective on the latter date. It in fact contains no reference to the Extension Act and no provisions depending upon it or suggesting any consciousness of the existence of such an Act; but, on the contrary, recites that it is made under the provisions of the original Reclamation Act "and Acts amendatory thereof or supplementary thereto," and the Act of February 21, 1911 (36 Stat. 925)—known as the Warren Act. All its provisions contemplate a fair and equitable distribution of costs and expenses over all the project lands, and it is manifest that neither party then contemplated that the project lands in the District would or could escape any burdens then or thereafter equitably apportionable to them. And at that date it must certainly have been known to both parties that a necessity for drainage would soon arise on some of the project lands outside the District.

It was under such circumstances that the Secretary agreed to provide a drainage system for the District and thereafter actually did construct such a system at the primary expense of the Reclamation Fund. To now set up the provisions of the Extension Act and the alleged impracticability of assessing benefits under the State law, is wholly inconsistent with the agreement, and, as it seems to us, scarcely in keeping with good faith. It is certainly not in keeping with the fundamental requirements of the original Reclamation Act and of

the Warren Act, which are that the charges " shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, *and shall be apportioned equitably*" (Act June 17, 1902, 32 Stat. 388, § 4); and that the charges under contracts authorized by the Warren Act " shall be just and equitable as to water users under the government project " (36 Stat. 925, § 1). See *Swigart* v. *Baker*, 229 U. S. 187; *Yuma Water Ass'n* v. *Schlecht*, 262 U. S. 138.

The District Court commented severely upon the inequity of the appellant's claim. It said (R. 34):

> During the earlier part of the operation of the system, when they were threatened with destruction or injury from the rising ground water, they sought and were given protection by the construction of a drainage system, the cost of which was included in the general construction charge, and as such was, of course, ratably apportioned to all the lands in the Project. Now, when as a result of the further operation of the system, for their use and benefit, as well as for the balance of the Project, other lands are menaced in the same way and from the same source, they seek to shift the entire burden of similar protective measures to the lands to be directly benefited. When they were threatened they did not, as now, invoke the doctrine of assessment of benefits; at least no such doctrine was recognized or applied in distributing the cost of the drainage facilities created for their protection.

II

It is for the Secretary of the Interior to determine what are "costs of operation and maintenance," at least in the first instance; and his determination can only be attacked for fraud or gross error

In all the reclamation legislation up to this time there is no attempt to define "construction" charges or "operation and maintenance" charges. Section 4 of the Extension Act which appellant relies on, merely declares that no increase of "construction charges" shall be made "after the same have been fixed by public notice," except by agreement with a majority of the water users, etc. Section 5 merely declares that "in addition to the construction charge" water users shall be liable to an "operation and maintenance" charge, and then declares that such charge "shall be made for each acre-foot of water delivered"; but with a minimum charge of one dollar per acre, whether irrigated or not. Neither section throws any light upon what are to be considered charges of the one kind or the other.

The courts themselves have drawn no clear distinctions between the two classes of charges. Prior to the passage of the Extension Act this court had already held that "costs of construction," as used in the original Reclamation Act, included the expenses of operation and maintenance, and authorized the Secretary to impose a separate operation and maintenance charge upon each acre of

land for which water was furnished. *Swigart* v. *Baker,* 229 U. S. 187. In reaching that conclusion the court said (p. 193):

> The statute provides that the cost of construction of the Project shall be charged against the land within the irrigable limits. The phrase is not expressly defined and being general in its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to "construct internal improvements" warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. *In re Fowler,* 57 N. Y. 60; *Seymour* v. *Tacoma,* 6 Washington, 138; *Attorney General* v. *Boston,* 142 Massachusetts, 200; *Pelham* v. *Woolsey,* 16 Fed. Rep. 418; *Atchison &c Ry.* v. *McConnell,* 25 Kansas, 370; *Bell* v. *Maish,* 137 Indiana, 226; *Weston* v. *Hancock County,* 98 Mississippi, 800, 54 So. Rep. 307. So, in the present case the statute provides that the Secretary may assess "the cost of construction of the project" without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the Reclamation Act.

In arriving at its conclusion the court laid particular stress upon the clear intent of Congress that

the reclamation fund was to be kept intact as a revolving fund, undiminished by costs or expenses of any kind. That decision and the cases cited by the court show that the expressions "costs of construction" and "construction costs" have no fixed and definite meaning universally or even generally applicable, but are to be construed in each case so as to carry out the purposes of the legislation in which they are found. Other decisions show that the same is true of the expressions "operation" and "maintenance" costs or charges. Thus it has been held that statutory authority to "maintain" a public park by the levy of special assessments includes authority to *improve* them, *People* v. *Ennis,* 188 Ill. 530; that a statute requiring coterminous owners to " maintain " fences between them was broad enough to include the erection of a fence, *Hoar* v. *Hennessy,* 29 Mont. 253; and that constitutional authority to provide by local laws for the " maintenance of public roads and highways " included authority to *provide* a system of roads and highways. *Ex parte Cooks* (Tex.), 135 S. W. 139; *Smith* v. *Grayson County,* 18 Tex. Civ. App. 153, 156.

The foregoing decisions are of course somewhat exceptional, but they show how broad a meaning may be given when the fundamental purposes of the legislation require it. More apposite are those cases which deal specifically with operation and

maintenance charges. In *Schmidt* v. *Louisville, etc., Ry. Co.,* 119 Ky. 287, 302, it was said:

> There is no rule of law declaring what constitutes operating expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact. There can, in this view be no sort of inconsistency in this court holding now, *if the proof warrants,* that these matters, or any of them, are not operating expenses, and its having held on *a different state of facts, with different testimony,* that they were of that description.

On a preponderance of evidence, therefore, the court held that certain items comprising rents and taxes, among others, were chargeable to capital account and not to operating expenses.

In *Commonwealth* v. *Phila & Erie R. Co.,* 164 Pa. 252, on the other hand, it was decided that where a railroad company, after completing its roadbed, tracks, and other fixed structures, leased all its rolling stock and equipment from another road, the rentals paid therefor were chargeable as operating expenses, although it would seem that expenditures made to provide rolling stock and equipment, whether by purchase or lease, would more naturally be considered a capital charge. In *St. Louis Union Trust Co.* v. *Texas Southern Ry. Co.,* 59 Tex. Civ. App. 157, 165, 166, the following items, among others, were held to be operation charges: car rentals, rentals of terminal facilities,

loss and damage to freight and cars by fire, insurance on property, " certain taxes," ties and bridge timber, and claims and judgments for killing stock, and for personal injuries. After enumerating the items, the court added:

> It cannot be said, as a matter of law, that the several demands mentioned did not grow out of and are not expenses necessarily incident to operation of the railroad—

thus recognizing the inherent impracticability of classifying, *as a matter of law,* all expenses into construction or capital charges and operation and maintenance charges, and the elements of fact and evidence to be considered in many cases.

In practically all cases, however, it is held that damages to persons and property caused by the operation of a railroad or other plant are chargeable as expenses of operation. *St. Louis Trust Co.* v. *Railway Co., supra; Smith* v. *Eastern R. Co.,* 124 Mass. 154; *Green* v. *Railway Co.,* 97 Ga. 15; *Railway Co.* v. *Railway Co.* (C. C. A.), 93 Fed. 543; *Cowdrey* v. *Galveston, &c., R. Co.,* 93 U. S. 352, 354; *Barton* v. *Barbour,* 104 U. S. 126, 131; *Anderson* v. *Condict* (C. C. A.), 93 Fed. 349; *Klien* v. *Jewett,* 26 N. J. Eq. 474. In *Anderson* v. *Condict, supra,* it was said (p. 354):

> Technically, perhaps, payment for personal injury cannot correctly be denominated cost of operation; *but it is an expense incurred in and by reason of the operation, and as such should be allowed in the accounts of the receiver.*

In September, 1920, Judge Dietrich, having before him certain questions relating to the construction charges fixed by the Secretary for this project, and referring to the probable future need of drainage for lands outside the District, said:

> Seepage is one of the natural incidents of operating the system, and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for operation and maintenance as any other expense to prevent damage from operation. (Payette-Boise Water Users Ass'n *v.* Bond, 269 Fed. 159, 170.)

Possibly the Secretary relied in part upon this suggestion, when, in the following year, he fixed the special operation and maintenance charge now in question. It is true that, some two years later, the Supreme Court of Idaho held that under the State law the expense of providing drainage was not a proper operation and maintenance charge, and therefore could not be assessed at a flat rate per acre. *Nampa & Meridian Irr. Dist.* v. *Petrie,* 37 Idaho, 45, 54, 57. The latter decision, while entitled to some weight, is the opinion of a single State Supreme Court on the general question as to what are proper operation and maintenance charges, can not of course be accepted as controlling in respect to the authority and discretion of the Secretary in fixing charges under the federal legislation.

Now, the necessity for draining irrigated lands and the expenditures therefor are direct results of the operation. The lower lands become water-logged from seepage and drainage from the higher irrigated lands and the ditches supplying them. The water-logging increases progressively, and without drainage the lands affected rapidly deteriorate and soon become unproductive. The damage caused is "incurred in and by reason of operation," and is clearly analogous to damages to property and life in operation of a railroad or other plant.

Moreover, as was pointed out by the Circuit Court of Appeals in this case, it can not generally be known when and where water-logging will first appear or how far it will spread. Drainage works, therefore, can not safely be constructed until actual irrigation has been under way for a number of years. This is sufficiently shown in the Nineteenth Annual Report of the Reclamation Service. Thus it is said (p. 13):

> Adequate drainage becomes, sooner or later, a matter to be dealt with on practically every project, and only the proper solution of the problem will result in preventing or checking seepage and water logging of the soil and deposits of alkali in amounts sufficient to deter plant growth and cause abandonment of the affected are .
>
> To a large extent the drainage problem is closely allied with that of excessive use of water, although this is by no means true in all cases. However, many factors in the

problem will eventually be eliminated or lessened by insistence on the highest standards in the use of water, with stress laid upon the desirability of introducing the rotation system of water delivery wherever practicable.

Irrespective, however, of the methods employed in the delivery of water, there will always be a drainage problem, more or less serious, on most projects, since the escape of some water to the lower levels can not be avoided. Here the excess water joins ground water, with a consequent rise in the water table and a resultant condition of seepage, which can be corrected only by adequate drainage systems. A large part of the funds available to the Service necessarily has been and must continue to be employed in the construction of these drainage works. The results accomplished in protecting threatened areas and in reclaiming areas already seeped and water-logged fully justify the cost.

In these annual reports the conditions as to water logging and drainage for each government project are set forth in separate paragraphs, and they amply demonstrate that it is impossible generally to provide drainage systems in advance or even early enough to include them as " construction costs " in the public notice fixing those costs for the various projects. In some cases it is true that drainage expenses were included in the construction charges, but this was due to the fact that portions of many projects were irrigated for several years before the construction charges were

fixed; and seepage, where it then appeared, was taken care of in part by drainage works constructed early enough to include the expense in the charges announced in the public notice. The fact that in some instances they were so included did not amount to a final determination that all drainage expenses are " construction costs," because, if for no other reason, the words " costs of construction," as used in the original legislation, were by this court held to include all operating and maintenance expenses. *Swigart* v. *Baker, supra.*

On this topic we need only add that this court itself has recognized that the construction of drainage works must necessarily follow after a period of irrigation. In *Ide* v. *United States,* 263 U. S. 497, 506–7, it was said:

> Measures for collecting and using the seepage could not well be taken in advance of its appearance. When it began to appear in appreciable quantity the plaintiff's officers took up the formulation of plans for utilizing it. The matter was much considered, for like problems were arising in connection with other projects.

The extent of the damage occasioned by seepage, or water logging, is shown by many items in the reports of the Reclamation Service. In many cases it has been necessary to suspend the collection of construction as well as operation and maintenance charges because the lands had been rendered unproductive by water logging. Thus in the Nine-

teenth Report (p. 168) it is said, referring to the Huntley Project:

> For the calendar year 1919 operation and maintenance and construction charges were suspended on 1,366 acres of land that were seeped or had not been fully reclaimed from the effects of seepage.

Again (p. 249, Newlands Project):

> Based upon surveys and examinations made during August, 1919, recommendation was made and approved granting temporary suspension of charges on 1,365 acres of seeped and alkalied lands. This represented an area of about 144 acres in excess of that upon which charges were suspended during the previous year, but comprised only a portion of the lands so affected, etc.

Again (p. 316, Twentieth Annual Report, Belle Fourche Project):

> Seepage encroachment during the year was very slight. The additional acreage relieved of charges on account of seepage amounted to 430 acres.

And again (p. 383, Shoshone Project):

> The principal work was on open drains in the North Garland area, where 4,750 acres were damaged by seepage and 4,750 acres seriously threatened at the beginning of the year.

Many similar items occur in the reports for other years. They demonstrate not only that drainage expenses are incident to operation and a direct

consequence thereof, but also that without drainage large proportions of the project lands would become wholly incapable of returning to the reclamation fund the charges for which they are liable, thus defeating one of the fundamental requirements of the reclamation legislation.

It is apparent, therefore, that on the authorities cited, the question whether a particular item of expense is a construction cost, or an operation and maintenance cost, is mainly one of fact; and that damage by seepage is occasioned by, and is wholly a result of "operation," and therefore within the principle of the cases which hold that injury to persons or property by operation of a railroad or other plant are properly chargeable as expenses of operation.

It follows that, in classifying these expenses and imposing them upon the water users as costs of operation, the Secretary of the Interior determined a matter of fact, or a matter of mixed fact and law, and exercised a discretion vested in him by Congress. In doing so he has violated no statute, because there is no statutory definition of the terms employed; he has disregarded no legal principle established by the courts, for the courts themselves have announced no controlling principles, and the decisions most closely analogous favor the classification which he has adopted.

It was on this ground alone that the Circuit Court of Appeals upheld the Secretary's action. And we need only add that if this charge cannot

be imposed as an operation charge by the Secretary, then, under Section 4 of the Extension Act, it can only be imposed with the consent of the majority of the water users, as a construction charge. But as they were not deterred from bringing this suit by the gross inequity of the results they seek to achieve by it, there is little hope that they will voluntarily agree to do equity hereafter.

III

The appellant agreed, in substance and effect, to be bound by the decision of the Secretary in fixing operation and maintenance charges

Section 12 of the contract provides, among other things (R. 11), that:

> The project lands in the District shall pay the same operation and maintenance charge per acre *as announced by the Secretary of the Interior for similar lands of the Boise Project, etc.*

It will be noted that the agreement is not to pay its ratable proportion of the operation and maintenance expenses incurred, but to pay operation and maintenance charges "as announced by the Secretary." It may be admitted, of course, that if the Secretary in bad faith or by an abuse of discretion announced as an operation and maintenance charge an item of expense which, as a matter of law and by clear and definite decisions, was a construction expense, the District would not be bound to accept his decision. But in view of the

lack of any clear legal distinction between the two classes of expenses and the element of fact always to be considered, the agreement clearly referred the matter to the discretion of the Secretary, and the District was bound, under the contract, by his determination. In other words, the contract itself referred the determination to the officer with whom, as both the courts below have held, the law had already placed it. Indeed, it seems to us that this is so manifestly the effect of the contract that the decrees below might be affirmed, if necessary, on this ground alone. If this view is correct, then obviously the appellant is in no position to object that the charge as fixed by the Secretary was laid upon a per-acre basis instead of "for each acre-foot of water furnished," as required by Section 5 of the Extension Act; for the contract was to pay "an operation and maintenance charge *per acre,*" as announced by the Secretary.

But in truth it is immaterial, so far as concerns that objection, whether the authority of the Secretary is rested on the law or on the contract, for in either event the District agreed that the charge should be on a per-acre basis.

IV

Appellant's contentions

1. It is contended, as we understand, that Section 8 of the original Reclamation Act requires the Secretary to be governed by State laws in fixing and apportioning charges. But the State laws with

which the Secretary is required to conform by that section are laws "relating to the control, appropriation, use, or distribution of water," and not laws relating to the determination of charges and the manner of assessing the same.

2. It is said that by the creation under the State laws of an irrigation district comprising only a portion of the project lands, such lands were constituted a "separate unit" of the project in the meaning of Section 5 of the Extension Act; and as a consequence thereof, that no charges can be assessed against those lands because they will not be benefited, in fact, by the improvement. It is evident, however, that "unit" as used in the reclamation laws means a body of lands within the general project which are so situated physically that they may be supplied, irrigated, operated, and drained (if necessary), by works so far independent of other parts of the project that the costs thereof may be segregated and charged against those lands alone. The creation or establishment of such a unit is necessarily the act of the Secretary, who must, of course, arrange his plans of development and adapt his methods of cost keeping to that end from the beginning. In fact, the 140,000 acres of project lands with which we are here concerned, lying partly within and partly without the District, constitute one "unit" of the Boise Project. The Boise Project in its entirety comprises 329,803 irrigable acres. (20th Ann. Rept. Reclamation Serv-

ice, page 134, " Summary of General Data.") In the " Statement of Case," filed by the Secretary in one of the suits connected with this project, which appears in the record here (p. 45 et seq.) under the heading " Notes " (p. 48) it is stated that—

> The term " project lands " as used herein refers to lands *under the constructed unit* of the project and having no water rights from private canals, etc.

Manifestly this refers to the 140,000 acres as a unit of construction and a unit for fixing construction and other charges. Counsel themselves quote the above language in their brief (p. 18).

It obviously does not lie with the water users of a part of a project to establish such a unit, either by organizing themselves as an irrigation district under State law or otherwise.

In this instance, the contract between the Secretary and the appellant District is wholly inconsistent with an intention to create or recognize the project lands within the District as a separate unit of the " constructed unit." We need only refer to the first paragraph of the contract of 1915 which declares that *" as a part of the general drainage system of its Boise Project "* the United States will construct for the District a drainage system, etc. (R. 6); and to the provision in Section 12 declaring that—

> The Project lands in the District shall pay the same operation and maintenance

charge as announced by the Secretary for similar lands of the Boise Project.

Indeed, the whole contract is based upon an equality of burdens for all project lands, whether within or without the District. When the District needed drainage for its own lands it did not urge the unit idea, which would have required it to pay the entire costs thereof, but, instead, acted upon the theory that the whole project was a single unit both of original construction and drainage.

3. It is urged that by the State laws applicable to irrigation districts, such as the appellant, the costs of drainage works must be assessed against the District lands on the basis of benefits derived therefrom; and that as none of the District lands will be benefited by the drainage of project lands outside, the District will be wholly unable to collect the charges fixed by the Secretary.

The obvious and sufficient answer seems to be that the decision of the questions here involved can not be influenced by any consideration of difficulties to be encountered in enforcing the decree, due to provisions of existing State laws, which have no bearing whatever upon the questions of right now to be decided. If this court shall affirm the decree below, we have no doubt the State would modify the assessment provisions of her statute if that should be found necessary to enable the District to comply with its contract and the decree of this court.

We doubt, however, whether the difficulty is as great as counsel seem to think. The obligation of the District is to pay to the United States the total amount charged by the Secretary against the project lands of the District; and we think it possible that a way might be found, even under the existing State laws, to so distribute the burden that the assessment would be upheld by the State courts.

We may suggest that the case of *Colburn* v. *Wilson,* 24 Idaho, 94, possibly points out a way. The case relates to a project developed wholly under State laws, and through a single irrigation district. The irrigated lands comprised two separate bodies, one on the north side and the other on the south side of the Payette River. Water was supplied through a canal having two branches, one serving the north side lands alone and the other the south side lands alone. It appeared that the expense of maintaining and operating the south branch of the canal greatly exceeded, per acre served, the like expense for the north side branch; and the complaint was that the directors of the District had assessed the total costs for both branches, together with other expenses, *at a flat rate per acre,* on all the lands of the project. Yet the Supreme Court sustained the assessment under the very statute here relied on, saying that it was within the discretion of the board of directors. And in *Nampa & Meridian Irr. Dist.* v. *Petrie,* 37 Idaho, 45, 57, the court, citing *Colburn* v. *Wilson, supra,* clearly

stated that operation and maintenance charges can be assessed, under the State law, at a flat rate per acre, while construction charges can not.

Now if this court shall affirm the decree below, its decision will necessarily establish that the cost of the drainage expenses are proper operation and maintenance charges, and that all the project lands are liable ratably for the total cost of drainage works, both those already completed for the District and those yet to be completed for the lands outside the District. In that situation it would seem that the State decisions above discussed would be applicable precedents, and the District authorities would then be free to assess the benefits at a flat rate per acre, just as the Secretary has done.

This, however, is a mere suggestion, and, as indicated above, it is not incumbent upon us to point out how the decree may be carried out under existing State laws.

In truth, however, the District is blowing both hot and cold. It says it has no means under the State law of collecting the charge from the lands which must ultimately bear the burden, and therefore should not be held liable for it. Yet, when the project manager proposes to use a very effectual means to aid it in collecting from the lands, namely, by refusing to furnish water until payment is made, it seeks to enjoin him.

4. It is contended that in fixing this charge at a flat rate ($1.00 per acre) the Secretary violated the

provisions of Section 5 of the Extension Act. The contention is clearly unfounded. That section does first declare that the water user shall pay an operation and maintenance charge " for each acre-foot of water delivered." But this is immediately followed by a further declaration, really a proviso, that " each acre of irrigable land, *whether irrigated or not,* shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water." This means, course, that each irrigable acre, whether irrigated or not, shall pay a minimum charge as if it had been furnished with one acre-foot, though in fact it received no water at all.

The charge imposed was at the flat rate of one dollar per acre, and the order expressly stated that this was to be considered " a part of the *minimum* operation and maintenance charge per acre," and that the remainder of the *minimum* charge and any additional charge " per acre-foot of water delivered," in excess of the minimum, would thereafter be announced.

If this drainage charge could be legally assessed at all as an operation and maintenance charge, there seems no possible reason why it should not absorb, wholly or in part, the minimum expressly provided for by the statute, leaving the regular operation and maintenance charge to be based wholly or in part upon the per acre-foot basis of water furnished in excess of one acre-foot.

CONCLUSION

The position of the District is grossly inequitable. Damage from seepage and water logging is a direct consequence of operation (irrigation); and the cost of restoring the lands to productivity by constructing drainage works is properly chargeable, on settled principles, as an operation and maintenance charge. In any event, the classification of that expense as an operation and maintenance charge was within the power and discretion of the Secretary under the law. Moreover, and independently of any question of authority and discretion under the law, the District had by its agreement referred the classification of expenses to the Secretary and is bound by his determination in the absence of bad faith, which is not charged.

The decree should be affirmed.

JAMES M. BECK,
Solicitor General.
IRA K. WELLS,
Assistant Attorney General.
W. W. DYAR,
Special Assistant to the Attorney General.

FEBRUARY, 1925.

○

Supreme Court of the United States

OCTOBER TERM, 1928

No. 135

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

v.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service,
Appellee,

PAYETTE-BOISE WATER USERS' ASSOCIATION, Ltd.,
Intervenor and Appellee.

BRIEF OF PAYETTE-BOISE WATER USERS ASSOCIATION, Ltd., *Appellee*

J. S. ELDRIDGE, Boise, Idaho,
Solicitor for Said Appellee.

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CASES

INDEX

Supreme Court of the United States

OCTOBER TERM, 1923

No. 473

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

v.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service,
Appellee,

PAYETTE-BOISE WATER USERS' ASSOCIATION, Ltd.,
Intervenor and Appellee.

BRIEF OF PAYETTE-BOISE WATER USERS ASSOCIATION, Ltd., *Appellee*

STATEMENT OF THE CASE

The intervenor in this case, the Payette-Boise Water Users' Association, Ltd., was organized

> "by the government of the United States for the very purpose of providing a centralized agency to represent the settlers. Under its Articles of Incorporation and By-laws, it was to perform important functions and by its contract assumed large obligations."

Payette-Boise Water Users' Association vs. J. B. Bond, et al, 269 Fed. 159, quoting from the bottom of page 170 and top of page 171.

The Payette-Boise Water Users' Association and the government of the United States entered into the contract complained of as set forth in the complaint July 12, 1921.

T. p. 18 to 32, inclusive.

Paragraph 10 of said contract, among other things, reads as follows:

> "10. It is agreed and understood that all future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes and assessed against all project lands in the constructed unit, or first unit of the project. The operation and maintenance charges for drainage purposes coming due and payable in 1921 shall be One Dollar ($1.00) per acre, of which Fifty (50c) per acre shall come due and payable April 1, 1921, and Fifty (50c) per acre on October 1, 1921."

T. p. 22.

The contract, entered into between the government of the United States and the appellant in this cause under which the appellant contracted for a large amount of drainage to be done and performed within the Nampa and Meridian Irrigation District by the government of the United States and under which a large amount of water rights was contracted to be

furnished by the government, among other things provides:

> "The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notices from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."
>
> T. p. 11 and 12.

The contract further provides:

> "WHEREAS, it is believed that under existing conditions the only way in which the additional water supply and drainage system required by the District can be secured promptly and at a cost which the land owners of the District can afford to pay, is by means of a contract between the District and the United States."
>
> T. p. 6.

Also the following provision is found in the contract:

> "1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars ($557,000.00). The location of the drains, to be constructed, is shown on the map attached hereto and marked Exhibit "A", it being understood that in general drains numbered "one" on the

said map will be constructed first, drains numbered "two" will be constructed next, drains numbered "three" will be constructed last, so far as said limit of expenditure will allow such work to go, such drainage system to have sufficient capacity in its main drains to carry the seepage water flowing into the District from the lands lying above the District and draining into it, as well as that originating in the District itself."

T. p. 6 and 7.

The contract also provides:

"3. That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand Dollars ($266,000), in the same number of annual installments not less than ten (10) and same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project."

T. p. 7 and 8.

The contract also provides:

"No portion of said sum of Two Hundred Sixty-six Thousand Dollars ($266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof."

T. p. 8.

The contract, among other things, provides:

> "That after the construction thereof, the District will maintain said drainage system in good serviceable condition, at its own expense, and shall charge the cost thereof to the old water right lands in the District in the proportion which the amount of construction cost chargeable to the old water right lands in the District, to-wit, Two Hundred Sixty-six Thousand Dollars ($266,000) bears to the total construction cost, to-wit, Five Hundred Fifty-seven Thousand Dollars ($557,000), and will charge the balance to the United States."
>
> T. p. 8.

The contract, among other things, provides:

> "and each year after the completion of the Arrowrock Reservoir, will deliver to the District for distribution to the Project lands in the District lying under the canal system of the District, as nearly as practical, the same proportionate share per acre of the water actually available from said works of the United States, both flood water and stored water, as is provided for similar lands in the United States Boise Project, outside of the District except as otherwise provided in paragraph 12 hereof, but no more."
>
> T. p. 11.

The supplemental contract between the government of the United States and the appellant here bears date the 5th day of November, 1918, (T. p. 13 to 17 inclusive) and among other things provides:

> "1. WHEREAS, under that certain contract between the United States and the Nampa & Meridian Irrigation District, dated June 1, 1915, it is provided that as a part of the general

drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars ($557,000)."

T. p. 13.

Said contract among other things provides:

"NOW, THEREFORE, it is hereby agreed that the District will purchase from the United States for said lands, and the United States will sell to the District for said lands, water rights from the irrigation works of the said Boise Project, and the District will pay the United States for said rights at the same rate per acre and will apportion benefits to said lands at the same rate per acre as other project lands in the District and the water rights to be furnished for said lands to be of the same kind and furnished upon the same terms and conditions as those furnished to project lands of the District outside of the corporate limits."

T. p. 16.

The bill of complaint, among other things, sets forth that the 40,000 acres of dry lands within the Nampa & Meridian Irrigation District constitutes a part of "the Government irrigation system of the Boise Project."

T. p. 1.

Then the bill of complaint sets forth the agreement to "pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise project."

T. p. 2.

It is alleged in the complaint that the water table on the Boise Project outside of the Nampa & Meridian Irrigation District is rapidly rising and that the lands unless drained will be ruined and suffer irreparable injury, meaning the lands under the government project and against which the government of the United States holds its lien for return of the money invested by it.

T. p. 2 and 3.

The complaint alleges the public notice of the Secretary of the Interior of February 15, 1921, levying assessments for drainage as operation and maintenance charges.

T. p. 3.

The only challenge to be found in the complaint of the authority of the Secretary to levy and collect charges for drainage is as follows:

> "That the construction of said drainage works was not an operation or maintenance charge as contemplated in said contracts but was in fact a construction charge for the benefit of lands outside the Plaintiff District, which the Secretary of the Interior had no jurisdiction to levy against Complainant and which Complainant had no jurisdiction to levy under the laws of Idaho against the lands within its boundaries; and that the cost of said proposed drainage works should be collected solely from the Project Lands outside of Complainant District under the certain contract, stipulation and judgment, hereinafter referred to as Exhibits....."

T. p. 3 and 4.

It is further alleged in the complaint that the Secretary of the Interior has no authority to construct the drainage works except under contracts with individuals, said allegation being as follows:

> "That the Honorable Secretary of the Interior has no authority or jurisdiction to construct said works except under the said contracts of said individual land owners and with the payments made by them as provided therein."
>
> T. p. 5.

The complaint further alleges that the defendant threatens and, if not enjoined and restrained by the mandatory injunction of this court, will refuse to specifically perform said contract and the prayer prays for specific performance.

T. p. 5.

The complaint refers to the contract between the government of the United States and the Payette-Boise Water Users' Association, intervenor, bearing date the 12th day of July, 1921, and sets up a portion of said agreement as an exhibit to the complaint and pleads what is known as "Exhibit X,"

T. p. 18 and 19.

but did not incorporate Exhibit "X" in the contract. Exhibit "X" forms a part of the contract of July 12th, 1921, between the government of the United States and intervenor herein, Exhibit "X," however, being referred to and being set out in the complaint in intervention, was before the court at the time it

rendered its decision from which this appeal is taken.

T. p. 45.

Exhibit "X" is a statement and dedication of the Boise Project showing the construction charges of the Boise Project including drainage done and performed under the contract of June 1, 1915, pleaded by the appellant herein between the appellant and the government of the United States, said Exhibit "X" shows just what portion of the drainage of the Nampa & Meridian Irrigation District was paid for by project lands outside of the Nampa & Meridian Irrigation District, which may be referred to as project lands under authority of the Payette-Boise Water Users' Association. Said Exhibit "X" will be found, beginning at page 45 of the Transcript, and the costs of drainage charged to the project outside of the district for drainage in the district is set forth on page 47 of the Transcript, the same being a large sum of money charged to the lands outside of the district for drainage within the district. The officers of the reclamation service moved to dismiss plaintiff's complaint on the ground that the same did not state facts sufficient to constitute a cause of action in equity and that the complaint stated no grounds for equitable relief.

T. p. 32 and 33.

The intervenor moved to dismiss plaintiff's complaint upon the same grounds set forth in the motion of the officers of the reclamation service and upon the

further ground that the United States of America is a necessary and indispensable party to the proceedings.

T. p. 44.

ARGUMENT

An examination of the statement of this case, in which is set forth various excerpts from the contracts pleaded by the plaintiff, and of the bill of complaint discloses that the only objection raised in the complaint and the only thing complained of in the complaint is that the Secretary of the Interior is without jurisdiction to levy the assessments for drainage purposes. The term "jurisdiction" in its ordinary sense is used in connection with judicial officers and judicial proceedings but as used in the complaint the pleader undoubtedly intended to use it in the sense of lack of authority and treating the term in that sense, we find from an examination of the contract of June 1, 1915, between the Nampa & Meridian Irrigation District and the government of the United States that authority was expressly conferred by terms of contract upon the Secretary of the Interior to do the very identical things that he had done and of which the district complains, for we believe it must be conceded that the following language confers jurisdiction upon the Secretary:

> "The project lands in the district shall pay the same operation and maintenance charge per acre

as announced by the Secretary of the Interior for similar lands of the Boise Project."

Now here it must be conceded that the district and the government have agreed that the Secretary shall have power and is given authority to levy assessments for operation and maintenance such as he levies against other lands outside of the district. There is no allegation in the complaint charging that the Secretary of the Interior has wrongfully or unlawfully levied any assessments or has acted arbitrarily or oppressively in levying the assessments or that he has charged more than was necessary for the work in hand or has committed a single act or done a single thing that is wrongful or hurtful to anyone. The only allegation in the complaint challenging his authority is that he is without "jurisdiction." Now, having agreed that the Secretary of the Interior could do these things and not complaining in any manner whatsoever as to how he has conducted himself or to whether or not the Secretary has acted to the injury of anyone or has invaded any lawful right of anyone or violated any statute, it seems to us clearly that the complaint fails to state any facts whatsoever entitling the plaintiff to relief.

Contracts investing a government officer, such as the contract before the court, with authority to act have often been construed by this Court and in the various Federal jurisdictions. In the case of United States vs. Gleason, this Court said:

"The judgment of an engineer to whom a contract refers the determination of the question of performance can be revised by the court only upon allegation and proof of bad faith or of mistake or negligence so gross as to justify an inference of bad faith."

United States vs. Gleason, 175 U. S. 588, 44 L. ed. 284.

Kihlburg vs. United States, 97 U. S. 398, 34 L. ed. 1106.

Innumerable cases could be cited to the same effect. Here we have no allegation of bad faith nor any complaint whatsoever except lack of jurisdiction which has been conferred by the very terms of the contract itself. There is no allegation whatsoever in the bill of complaint to bring the case within the well known rule of law that government officials may be sued, restrained and enjoined from doing some unlawful act through some arbitrary or oppressive conduct in violation of a citizen's right. But the court will search in vain for any allegation in the bill upon which such a claim may be predicated.

An examination of the complaint discloses that the Secretary of the Interior levied assessments for drainage in February, 1921, and that in July, 1921, a contract was made between the United States of America and the intervenor providing for drainage by means of operation and maintenance charges. The Secretary, however, as stated, had levied assessments on the 40,000 acres of land within the Nampa & Meridian Irrigation District known as project lands and

all of the other project lands outside of the Nampa & Meridian Irrigation District for drainage purposes prior thereto. The contract of July 12, 1921, is assailed in this proceeding, which, if successful, would abrogate a contract made between the United States of America and the intervenor, and the prayer of the complaint asks for specific performance against the officers of the United States. We believe that this proceeding so involves the government of the United States and its property as to in effect amount to a suit against the United States. The last announcement on the subject by the Supreme Court of the United States is to be found in the case of Josephus Wells vs. Daniel C. Roper, 246 U. S. 335, 62 L. ed. 755. Every presumption is indulged in favor of the acts of a public officer and in the absence of an allegation that the public officer has violated some law or committed some wrongful or arbitrary act, the presumption will be indulged that the Secretary has acted properly.

The presumption is always indulged in the absence of anything to the contrary that a public officer properly performs his duty.

> Weyauwega v. Ayling, 99 U. S. 112, 119, 25 L. Ed. 470; Martin v. Mott, 12 Wheat 19, 31, 6 L. Ed. 537; Galt v. Galloway, 4 Pet. 332, 343, 7 L. Ed. 876; Philadelphia, etc. R. Co. v. Stimpson, 14 Pet. 448, 458, 10 L. Ed. 535; Rankin v. Hoyt, 4 How. 327, 335, 11 L. Ed. 996; Wilkes v. Dinsman, 7 How. 89, 131, 12 L. Ed. 618; United States v. Weed, 5 Wall, 62, 73, 18 L. Ed. 531;

Butler v. Maples, 9 Wall 766, 778, 19 L. Ed. 822; Miller v. United States, 11 Wall, 268, 300, 20 L. Ed. 135; Pendleton County v. Amy, 13 Wall. 297, 20 L. Ed. 579; Lapeyre v. United States, 17 Wall. 191, 200, 21 L. Ed. 606; Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; District of Columbia v. Robinson, 180 U. S. 92, 101, 45 L. Ed. 440; New York State v. Barker, 179 U. S. 279, 45 L. Ed. 190; Quinlan v. Green County, 205 U. S. 410, 422, 51 L. Ed. 860.

It is equally well established:

"That there is a presumption that a discretion vested in public officers has, in a given case, been rightfully and properly exercised."

"Discretion rightfully exercised.—Butler v. Maples, 9 Wall, 766, 768, 19 L. Ed. 822; Cumming v. Richmond County Board of Education, 175 U. S. 528, 544, 44 L. Ed. 262; Philadelphia, etc. R. Co. v. Stimpson, 14 Pet. 488, 458, 10 L. Ed. 535; Wilkes v. Dinsman, 7 How. 89, 131, 12 L. Ed. 618; United States v. Weed, 5 Wall 62, 73, 18 L. Ed. 531; Mullan v. United States, 140 U. S. 240, 245, 35 L. Ed. 489; Swain v. United States, 165 U. S. 553, 559, 41 L. Ed. 823."

The latest case we have been able to find in construing the authority given a public officer by means of the terms of a contract to perform an act and the binding effect thereof will be found in the case of Wells Bro. Co. of New York vs. United States, 254 U. S. 83, 65 L. ed, 148, wherein this Court, in con-

struing a contract very similar to the one between the Nampa & Meridian Irrigation District and the government of the United States relating to the payment of assessments "as levied by the Secretary," laid down the rule that such a contract vests in the public officer authority to perform the things provided for in the contract and also binding upon the parties thereto.

> "The United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts."
>
> United States vs. Babcock, 250 U. S. 328, 63 L. ed. 1011.

The most enlightening case we know of on the power and authority of the Secretary of the Interior to levy assessments for the purpose of maintaining government reclamation projects is to be found in the case of Swigart vs. Baker, 229 U. S. 187, 57 L. ed. 1143, in which, quoting from page 193 S. C. and page 1146 L. ed., this Court said:

> "The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined, and being general in its terms, *is not necessarily limited to building, but may include the preservation and maintenance of what has been built.* For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes *for its maintenance.* Power to construct a dock im-

> posed the duty of operating it. Permission to 'construct internal improvements' warranted the purchase of a plant already built, and authority to construct a road *conferred power to maintain it.* Re Fowler, 53 N. Y. 60; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Atty. Gen. v. Boston, 142 Mass. 200, 7 N. E. 722; Pelham v. The B. F. Woolsey, 16 Fed. 418; Atchison T. & S. F. R. Co. v. McConnell, 25 Kan. 372; Bell v. Maish, 137 Ind. 226, 36 N. E. 358, 1118; Weston v. Hancock County 98 Miss. 800, 54 So. 307. So, in the present case the statute provides that the Secretary may assess 'the cost of construction of the project' without defining the term."

An examination of said decision discloses that under the statute all authority for levying operation and maintenance assessments was, by this Court implied, for the statute, in terms, provided no such authority, and it does not appear unreasonable in the light of the Swigart case to assume that the Secretary of the Interior has implied power to do all things necessary in a reasonable manner for the protection of the investment of the government of the United States in government reclamation projects in connection with their maintenance and to prevent the same from being destroyed and not only the government lose its investment but the settlers upon government reclamation projects lose their homes as well on account of seepage due to irrigation.

It has been decided, and we believe has become

firmly established that drainage is a necessary complement of irrigation and that it is a necessary integral part thereof.

Pioneer Irrigation District vs. Stone, 23 Idaho 344, 130 Pac. 382;

Bissett vs. Pioneer Irrigation District, 29 Idaho 98, 120, Pac. 461;

Hillcrest Irrigation District vs. Brose, 24 Idaho 376, 133 Pac. 662;

Nampa & Meridian Irrigation District vs. Petrie, 28 Idaho 227, 153 Pac. 421.

United States vs. Ide, 277 Fed. 382.

We believe an examination of the contract, excerpts which are set forth in the statement of this case, will clearly disclose that the Nampa & Meridian Irrigation District and the government of the United States had a definite understanding that the drainage system partially constructed under the contract would be extended and that the project lands within the Nampa & Meridian Irrigation District were to be treated as a part of the Boise Project and that supervision of those lands by the Secretary of the Interior was to be retained by him for the purposes of maintaining and protecting the project and that such lands were to be treated as a whole. The last excerpt from the contract, among other things, provides: That the project lands within the district shall receive the same,

> "water rights * * * * * to be furnished for said lands to be of the same kind and furnished

upon the same terms and conditions as those furnished to project lands of the district outside of the corporate limits."

There are expressions running all through the contracts, as shown by the excerpts in this brief, that those lands were to be treated by the government, acting through the Secretary, in the same manner and upon the same terms as project lands outside of the district and that a general drainage system for the Boise Project was started under the contract with the Nampa & Meridian Irrigation District and that extensions of it were contemplated and the use by the drains within the Nampa & Meridian Irrigation District were to be used by the project lands outside of the district and when we realize that, as shown by Exhibit "X" heretofore referred to, a large portion of the cost of drainage of the old, wet lands within the Nampa & Meridian Irrigation District were paid for and charged against the project lands outside of the district, we are confronted with an equitable situation that we believe the trial court was fully justified in taking cognizance of. It appears to us to be a most inequitable attitude for the Nampa & Meridian Irrigation District to assume, when it accepts contributions from project lands outside of its district for the draining of its old, wet lands within the district and then when called upon by the Secretary of the Interior to contribute its proportionate share necessary to protect a portion of the project outside of the

district, it refuses to do so yet retaining the benefits of the drainage provided for it at the expense of the project lands outside of the district.

We believe this attitude will not appeal to the conscience of this or any other court. The Circuit Court of Appeals should be sustained.

Respectfully submitted,

J. B. ELDRIDGE,
Attorney for Intervenor and Appellee.

Service admitted by receipt of copy this..... day of January, 1925.

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Attorney for Appellant.

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Attorneys for Appellee, J. B. Bond.